

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

FRIDAY, THE 6TH JULY 2007 / 15TH ASHADHA 1929

Crl.Rev.Pet.No. 430 of 2001(A)

**CRIME NO. 1/97/SCT OF THE ENQUIRY COMMISSIONER
AND SPECIAL JUDGE, THIRUVANANTHAPURAM.**

REVN. PETITIONER:

**STATE OF KERALA REPRESENTED BY THE
SUPERINTENDENT OF POLICE,
VIGILANCE AND ANTI CORRUPTION BUREAU
SPECIAL CELL, THIRUVANANTHAPURAM.**

**BY PUBLIC PROSECUTOR
MR. RAJENDRA SACHAR
MR. R. SATISH
MR. P.RAVINDRA BABU, .
MR. C.M. KAMMAPPU
SRI.P.A.AHAMMED**

RESPONDENTS:

**K. KARUNAKARAN, M.P.
VYSAK,T.C. NO. 40/1507, JAJGATHY,
THIRUVANANTHAPURAM.
IS IMPEADED AS RESPONDENT AS PER ORDER DATE
11-4-2001 IN CRL.R.P.**

**BY ADV. SRI.M.K.SREEGESH
ADV. SRI.S.V.BALAKRISHNA IYER (SR.)**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 13-06-2007, THE COURT ON 06-07-2007 PASSED THE
FOLLOWING:**

K.R. UDAYABHANU, J.

CRL.R.P.NO. 430 OF 2001

DATED THIS THE 6th July 2007

ORDER

The present proceedings is the offshoot of the revision petition filed by the State in this Court disputing the direction of the Special Judge that for proceeding against A1, who was the Chief Minister at the time when the offence was committed, the sanction under Section 19 of the Prevention of Corruption Act of the Speaker of the Lok Sabha is required as he is a sitting Member of Parliament. This Court had allowed the revision petition and A1 had taken it up before the Supreme Court vide Crl.A.No.801/2003. The Supreme Court as per judgment dated 6-12-2006 affirmed the view taken earlier in **R.S.Nayak v. A.R.Antulay (1984(2)SCC 183)** and reiterated in **Prakash Singh Badal v. State of Punjab (2007(1)S.C.C 1)** that sanction is not required. The contention raised subsequently by A1 in the above proceedings before the Supreme Court that the prosecution is the outcome of mala fides and that the varying

stands taken by the Government clearly indicated that the appellant/A1 is a victim of political rivalry of leaders of some political parties is the issue directed to be thrashed out by this Court. The situation highlighted by the appellant before the top Court is that the Home Secretary of the State on 24-11-2005 had filed an affidavit to the effect that the State Government wanted to withdraw the prosecution and that subsequently another affidavit has been filed by the successor Government swearing that there is no intention to withdraw the prosecution. Further it is the same person who had been opposing the application to withdraw the prosecution who is the present Chief Minister. Hence, according to the appellant, the contradictory stands taken by the Government is a clear case of political vendetta. Hence, the Supreme Court directed this Court to consider the matter relating to the plea of mala fides for which the parties were permitted to place relevant materials. It was also noted by the Supreme Court that the stand taken in **Prakash Singh Badal's** case (op.cit) is that even though there is an element of political rivalry, it is ultimately to be seen

whether materials exist to substantiate the allegations and that it is not the credibility of the person who makes the allegations but the existence of materials necessitating investigation which is relevant.

2. Consequent on the direction of the Supreme Court, the first accused and the State have filed affidavit, counter affidavit, reply affidavit and rejoinder affidavit raising and reiterating the respective contentions.

3. The case right now pending against A1 and 7 others in C.C.No.6/20003 in the Court of Enquiry Commissioner and Special Judge is with respect to the offences under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act and Section 120B IPC. On the filing of the F.I.R. (V.C.No.1/97) dated 21-3-1997 itself A1 had sought to quash the same vide proceedings initiated before this Court contending that this Court had dismissed earlier private interest litigations seeking to register the crime with respect to the allegations which was the sequel to the report of the Controller and Auditor General of India and hence on the same facts a fresh F.I.R. cannot be registered.

The above proceedings initiated under Section 482 Cr.P.C. was dismissed vide order in CrI.M.C.No.1353/97. The same was taken up before the Supreme Court which affirmed the view of this Court. In the meantime with the permission of the Supreme Court, charge sheet/final report was filed before the Enquiry Commissioner and Special Judge, Thiruvananthapuram on 23-3-2001. It was then that the Special Judge took the view that the sanction of the Lok Sabha Speaker is required to prosecute A1 as he is a Member of the Lok Sabha. It is in the order in CrI. Appeal No. 801/2003 filed by A1 over the decision regarding sanction that the matter has been remitted back by the Supreme Court to this Court to consider the allegation of mala fides.

4. As per the final report in C.C.6/2003 A1, Shri K. Karunakaran, the former Chief Minister of Kerala, A2, Shri. T.H.Musthafa, the then Minister for Food & Civil Supplies of the State of Kerala, A3, Shri. Padmakumar, the then Chief Secretary of the State and A4, Shri. Zacharia Mathew, the then Additional Chief Secretary who was also the Commissioner and Secretary of

Food and Civil Supplies Department as well as the Chairman of the Kerala State Civil Supplies Corporation (hereinafter to be mentioned as K.S.C.S.C) and A5, Shri. Jiji Thomson, the then Managing Director of K.S.C.S.C, A6 and A7, the Directors of M/s. Power & Energy Pvt.Ltd.(hereinafter to be mentioned as M/s. P&E Pvt.Ltd.) and A8, Shri. P.J. Thomas, the then Secretary of Food and Civil Supplies Department of the State were implicated.

5. The prosecution charge is that A1, the Chief Minister of Kerala during the period from 1991-92, A2, the Minister for Food and Civil Supplies during the above period and A3 to A5 and A8 who were the senior I.A.S. officers in the State service during the relevant period and A6 and A7, the Directors of M/s. P&E Pvt.Ltd. based at Singapore who were engaged in the sale and distribution of palmolein entered into a criminal conspiracy during the period from October 1991 to March 1992 at Delhi, Madras, Thiruvananthapuram and Ernakulam and other places for importing palmolein directly to the State of Kerala and in pursuance of the same managed to secure permission of the Government of India, misrepresenting facts to the Prime

Minister of India and the concerned authorities of Government of India at New Delhi that the import of 30,000 M.T.of palmolein in addition to the usual quota was essential for the requirement of the people of Kerala in connection with Dasara and Deepawali festivals of 1991 while in fact the quantity sought was far exceeding the actual requirements; and utilising the machinery of the State Government and the K.S.C.S.C. imported 15,000 M.T.of palmolein during the period February to March 1992 at an exorbitant price of 405 U.S.Dollars (hereinafter to be mentioned as USD) per MT whereas in fact the average price paid by S.T.C. in the preceding 30 days in January 1992 was only 392.25 USD. It is alleged that the agreement was executed even before the permission of the Government of India was received by the State Government and also before any order was issued by the State Government in this regard and also without inviting tenders or specifying the price of palmolein or shipment schedule for import. The import was also in violation of the terms and conditions specified by the Government of India in respect of import and distribution of palmolein. It is

alleged that A1 to A5 and A8, i.e. the then Chief Minister, Minister for Food & Civil Supplies, the then Chief Secretary, the then Additional Chief Secretary who was also the Commissioner & Secretary of Food & Civil Supplies Department as well as Chairman of K.S.C.S.C., the then M.D. of K.S.C.S.C., and the then Secretary of the Food and Civil supplies Department respectively abused the official positions and authority vested in them as public servants, acted illegally and with dishonest intention to secure pecuniary and other benefits to A6 and A7 to the tune of Rs. 2.32 crores and thereby causing corresponding loss to the Kerala State exchequer and thereby committed the offence of criminal conspiracy, criminal breach of trust and cheating punishable under the Indian Penal Code and P.C.Act. It is also alleged that A1, the then Chief Minister, A3, the then Additional Chief Secretary & A6, a Director of M/s. P& E Pvt.Ltd. held discussions at the instance of A1 at the Kerala House in New Delhi in the first week of October 1991 and in pursuance of the same, A1 sent a letter dated 5-10-1991 to Shri Narasimha Rao, the then Prime Minister of India in this regard and secured

sanction of the Government of India. A2, the then Minister for Food & Civil Supplies, A3, the Chief Secretary and A4, the Additional Chief Secretary by mutual assistance and with the consent of A1, prepared a note and presented the same in the meeting of the Council of Ministers as an urgent item outside Agenda on 17-11-1991. A2, A3, A4 and A8 with the direction and with the connivance of A1 obtained the approval of Council of Ministers headed by A1 suppressing the advantageous offer for import of palmolein at a low rate received by A3 from M/s. Nalin and Sons, DHD and side-tracking the willingness offered by similar company (C.I.Commodities Singapore etc.)having global reputation. The letter sent by A1 dated 5-10-1991 was prepared by A3 as per the instruction of A1, the then Chief Minister and A3, the then Chief Secretary gave direction to A4, the then Additional Chief Secretary-cum-Commissioner and Secretary of Food & Civil Supplies Department to take follow up action on the offer of M/s.P & E Pvt.Ltd. contained in their letter dated 9-11-1991 and also recommended for the decision of the Cabinet for approving the proposal violating the Store

Purchase Rules of the State of Kerala and the conditions laid down by the Government of India in Circular No. 1 10/91 EOP dated 6-11-1991. A4, without inviting tenders held further discussions with A6 & A7, the Directors of M/s. P & E.Pvt.Ltd. at Madras and in consultation with A8 prepared a detailed proposal incorporating the terms and conditions stipulated by the M/s. P & E Pvt.Ltd. in its offer and forwarded the same to the Government of India for sanction. A4 in pursuance of the earlier discussion, prepared a detailed proposal incorporating the terms and conditions advantageous to A6 and A7 and submitted to A1, A2 and A3 etc. for an urgent decision, fully aware that the sanction of the Government of India was not received by the State Government and also as to the receipt of an advantageous offer from M/s. Nalin and Sons DHD quoting low rate and directed A5, the Managing Director, K.S.C.S.C. to execute an agreement with M/s. P & E Pvt. Ltd. for purchase of 15000 MT of palmolein incorporating the terms and conditions advantageous to M/s. P & E Pvt.Ltd. A5 the then Managing Director of K.S.C.S.C. held discussions with A6 and A7 at Madras

long before M/s. P & E Pvt.Ltd. was chosen as the firm for importing palmolein officially by the State Government and further executed the agreement with M/s. P & E Pvt.Ltd. without obtaining permission of the Board of Directors of K.S.C.S.C. containing terms that are violative of the guidelines issued by the Government of India and incorporating terms favourable to the said company. Further, A5 wilfully abstained from exercising the buyers option in pricing and shipment schedule at the appropriate time which resulted in further loss and detriment to the State and intentionally delayed the fixing of price of palmolein and fixed the same at a belated date i.e. on 24-1-1992 and got ratification of the K.S.C.S.C.Board. A6 and A7, the Directors of M/s. P & E Pvt.Ltd. in pursuance of the criminal conspiracy at New Delhi in the first week of October 1991 forwarded the offer of M/s. P & E Pvt.Ltd. by letter dated 9-11-1991 to A1 furnishing the drafts of the documents, namely agreement, memorandum of understanding, letter to the Secretary, Department of Civil Supplies, Government of India. A6 and A7 further held negotiations with A5 at Madras on

22-11-1991 and A7 signed an agreement on behalf of M/s.P & E Pvt.Ltd. with A5 who represented the K.S.C.S.C. and 15000 M.T.of palmolein was imported to the State during February-March 1992 for which price was fixed on 24-1-1992, i.e. after 56 days of the execution of the agreement. A8, the then Secretary to Government of Kerala, Food and Civil Supplies Department held discussions with A4, the then Additional Chief Secretary and drafted a detailed proposal for import of palmolein virtually endorsing the terms and conditions incorporated by the M/s. P & E Pvt.Ltd. in the Memorandum of Understanding and other documents sent by the said firm to A1 along with letter dated 9-11-1991 and also making false statements to persuade the Government of India to accord sanction by Telex message dated 18-11-1991 addressed to the Secretary, Government of India, Ministry of Food and Civil Supplies, Krishi Bhavan, New Delhi followed by confirmatory letter dated 19-11-1991. A8, the then Secretary of Food & Civil Supplies Department further caused obstruction in the matter of offering the remarks by the Finance Department on the draft Government Order dated 2-12-

1991 by deliberately withholding the draft Government Order and the connected file from the Finance Department and deliberately ignored the provision of Store Purchase Rules, Business Rules and Secretariat Instructions. A4 & A5 entrusted with the dominion over the funds belonging to K.S.C.S.C. in the capacity as public servants dishonestly appropriated the funds in violation of the terms and conditions of Government of India Circular No.110/91/EOP dated 6-11-1991 and the provisions in the Store Purchase Rules of the Government and has intentionally secured unmerited pecuniary advantage to the tune of Rs.2.32 crores for A6 & A7 and thereby committed the offence of criminal misconduct. Thus A1 to A8 have committed the offence of criminal conspiracy under Section 120B IPC and A1 to A4 have committed the offence under Section 13(1)(d) of Prevention of Corruption Act and criminal conspiracy under Section 120B I.P.C. The evidence proposed to be adduced consists of the testimony of 55 witnesses and 138 documents.

6. Hence the main offence alleged is enabling A6 and A7 to have a pecuniary gain of Rs.2.32 crores which was made possible as purchase price of palmolein was fixed at 405 USD per MT instead of 392.25 USD which represented the procurement price or 30 days the average price of the purchase by STC as per the price clause stipulated in the Government of India guideline contained in Circular No. 110/91/EOP dated 6-11-1991. I find that the above circular contained the stipulation which has to be observed while the State Government is to import palmolein. The same runs as follows:

“ The price of imported oil would not be higher than the procurement price of STC or the average price paid by the STC in preceding 30 days”.

7. The crux of the prosecution allegations is the violation of the above price clause and that while the price as per the above clause paid by the STC was 392.25 USD on the date the price was fixed, the K.S.C.S.C fixed the price at 405 USD.

8. It is seen from the correspondence file that the sanction to prosecute the serving I.A.S. officers sought from the

Union Government under Section 19(1)(a) is yet to be obtained. The correspondence in this regard shows that the same was in the midst of clarification sought regarding the temporal connection between the opening of the ESCROW account and the fixing of price. Subsequent to the issuance of the Government Order to withdraw from prosecution, the former Government intimated the same to the Central Government.

9. The respective contentions put forth in the affidavits filed before this Court and in the Supreme court in support of the case of mala fide alleged by A1 regarding the turn round taken by the Government to rescind the withdrawal order and to the contra is to be considered. The main defence advanced by the former Chief Minister (A1) in support of the transaction executed by his Government with M/s. P & E. Pvt.Ltd is that the four States, Tamil Nadu, Kerala, Karnataka and West Bengal entered into agreements with the above company on identical terms. He has also furnished data with respect to the above agreements and import particulars that would show that the State of Karnataka has fixed the price at the same rate as Kerala,

i.e.405 USD per M.T. and West Bengal at 407 USD, i.e. 2 USD higher than that of the State of Kerala whereas the State of Tamil Nadu fixed the price at 392.50 USD. Tamil Nadu fixed the price on 31-12-1991, Karnataka on 1-2-1992, West Bengal on 24-1-1992 and Kerala fixed the rate on 24-1-1992. All those States followed the same pattern of negotiations in the fixing of the price. It is further pointed out that Kerala and West Bengal fixed the price on the same day . It is stressed that the State Government has filed an affidavit on 24-11-2005 conveying the decision to move the Court of Special Judge for withdrawal of the prosecution wherein it is explained that there was no loss to the State or unlawful gain to the accused and that the allegations of criminal conspiracy and other irregularities are not sustainable. It is also noted therein that the States like Tamil Nadu, West Bengal, Karnataka had followed the same price pattern and hence there is no merit in the allegations of corrupt motive in price fixation. The Supreme court had also permitted to initiate the proceedings to withdraw the prosecution, but in the meantime on 18-5-1996 Shri.V.S. Achuthananndan was sworn

in as Chief Minister of Kerala and soon after assuming office he made a public statement that the new Government would proceed with the prosecution of palmolein case. The above statement was made without caring to peruse the records of the case and with a pre-disposed mindset. Following the same, an affidavit was filed by the State before the Supreme Court on 27—7-2006 that the Government intended to continue the prosecution of C.C.No.6/2003. The affidavit is silent about the reasons mentioned in the earlier affidavit proposing to withdraw from the prosecution apart from disassociating from the factual and legal averments made in the earlier affidavit. The State cannot be permitted to change its stand merely because a new political party assumed power. The succeeding Government is duty bound to continue with the execution of the decision taken by the previous Government.

10. A reply affidavit has also been filed before the Supreme court by A1. It is also pointed out that the present Chief Minister is the very same person who had tried to get impleaded in the proceedings before this Court and in the

Supreme court and filed a petition and S.L.P.for the same. According to the deponent, the Government of India Circular dated 6—11-1991 has been complied with as the State had informed the Government of India that the price would not exceed the indicative price of the S.T.C. The same was the pattern followed by the State of Tamil Nadu also. The Tamil Nadu and Karnataka Governments were permitted to import palmolein at a price not exceeding the indicative price on the day they conclude the business. It is pointed out that the agreement in between the K.S.C.S.C and M/s. P & E. Pvt.Ltd. was executed after obtaining the approval from the Government of India on 26-11-1991. It was made clear in the agreement that the contract will be entered into only pursuant to the R.B.I. clearance and opening of ESCROW account. It is pointed out that no transaction of edible oil was possible on the basis of 30 days average price and hence the State of Tamil Nadu submitted its proposal dated 9-11-1991 and the same was approved by the Government of India. It was the agreement entered into by the State of Tamil Nadu that was taken as model agreement for

agreement concluded by other States including the State of Karnataka, State of West Bengal and State of Kerala. The copies of the agreements of the above States have also been produced. It is further asserted that the entire quantity of import was sold out within two months and the same yielded crores of rupees of profit to K.S.C.S.C which would belie the allegations that there is no requirement of import of palmolein. It was in the above circumstances that the State Government decided to withdraw the case.

11. It is further contended in the reply affidavit filed by A1 that it is admitted by the State that the Public prosecutor incharge of the case could not follow the direction to withdraw the prosecution due to the operation of the interim order of stay of further proceedings passed by the Supreme Court. The required permission was accorded by the Supreme Court on 20-4-2006 but the above order was passed after notification of election to the State Assembly; and due to impending elections the application for withdrawal of prosecution could not be filed prior to the State assembly elections. On 18-5-2006, the present

Government headed by Mr.V.S. Achuthanandann assumed power and thereafter issued instructions to the Public Prosecutor not to file application for withdrawal of prosecution. On 20-5-2007, the then Government ordered to cancel the G.O. dated 28—3-2005 and decided to revive the prosecution. The version that the erstwhile Government decided to withdraw from the prosecution without noticing all relevant facts and legal issues is incorrect. It would be evident from the files that there was a detailed examination of the matter before the decision was taken to withdraw from the prosecution and the views of the officials including the Director General of Prosecutions were ascertained. It is further pointed out that on a perusal of the order No.G.O. (Rt)105/05/Vig.dated 28-3-2005 it is evident that each and every allegations were analysed and opinion expressed. The G.O. was passed based on the decision of the Council of Ministers that had the benefit of a note of about 20 pages preferred after a thorough examination. The deponent has prayed that the Government files pertinent to the case be summoned for perusal by the court. It is further pointed out that once the

decision to recommend for withdrawal is taken, it is for the Public Prosecutor to look into the relevant materials and then file the application for withdrawal. Thereafter, it is for the court that is in seisin of the matter to pronounce upon the legality and propriety of the application for withdrawal. Issuance of the G.O. dated 25-7-2006 is intended to subvert the procedure prescribed by the Statute. It is pointed out that the Apex Court had permitted the present Chief Minister who was an intervener before the Supreme Court to raise the objection against the proposed withdrawal before the court concerned. He ought to have followed the said order of the Supreme Court rather than reversing the above order of the State for political reasons. A comparison of both the G.Os. would reveal that the subsequent G.O. has been issued without application of mind. An order without assigning reasons is ex-facie illegal.

12. On the other hand, the State had filed the affidavit pointing out that despite the decision taken to withdraw from the prosecution as expressed through the affidavit filed on 24-11-2005 in the Supreme Court in CrI.A. 801/2003 no

application for withdrawal was filed by the Public Prosecutor before the Court of the Special Judge. It is pointed out that in fact the decision was taken without consulting the Public Prosecutor and without concurrence of the investigating agency. After the change of Ministry in May 2006, the present Government re-examined the entire matter in detail after consulting the investigating agency and the Public Prosecutor in charge of the case and after due deliberations took a decision on 12-7-2006 to continue the prosecution. Pursuant to that G.O. (Rt)No.143/2006 Vig. dated 25-7-2006 was issued cancelling the earlier Government order for withdrawal of prosecution. Consequently the affidavit in this regard was filed before the Supreme Court by the Additional Chief Secretary to the Government on 27-7-2006. While CrI.A.No.86/98 filed by A1 was pending before the Supreme Court, the court by order dated 16-1-1998 had permitted the investigating agency to continue the investigation. Subsequently as per order dated 11-10-1999 the Supreme Court permitted the investigating agency to file the final report. The Supreme Court in its order in C.A.86/98 had

pointed out that the registration of F.I.R. against the appellants cannot be held to be the result of mala fides or actuated by the extraneous consideration; and further that the menace of corruption cannot be permitted to be hidden under the carpet of legal technicalities; and that in such matters probes are required to be determined on facts and circumstances in accordance with law. The court had further directed that the accused persons shall be at liberty to raise all such plea of law and fact as are available to them during the trial of case before the competent court of jurisdiction dealing with it. Hence, it is pointed out that the allegations of mala fides and political vendetta which were raised was repelled by the Supreme Court in CrI.A.No.86/98. It is the contention that the decision to withdraw the case was taken without considering the decision of this Court in CrI.M.C.1353/97 and that of the Apex court in CrI.A.No.86/98. It is stressed that the Government order dated 28-3-2005 itself would show that there was no proper application of mind. The above Government Order mentions the names of 11 persons as the accused in C.C.No.6/2003 whereas in fact there are only 8

accused in C.C.No.6/2003. The persons mentioned by names, i.e.N.V. Madhavan, I.A.S(Retd.)as accused No.9 and V.S. Senthil, I.A.S. mentioned as accused No.10 and Smt. T.P. Sarojam mentioned as accused No.11 were not arrayed as accused in the final report. The above Government order assumes that the above three persons were also charge sheeted. Hence, the order to withdraw prosecution against the above three persons also would clearly reveal that there was no proper appraisal of the actual facts of the case and that the decision was taken without consultation and concurrence of the prosecution agency. It is also alleged that in the above Government order no references are cited and only the word "read" is inserted and thereafter no reference letters or orders are cited. Further no action was taken to file the application for withdrawal in the Special Court. Hence, it is evident that the above order was issued arbitrarily. It is pointed out that as noted by the Supreme Court in **Pakash Singh Badal v. State of Punjab, (2007(1)S.C.C.1)** that even though there may be an element of personal or political rivalry, it is ultimately to be seen

whether materials exist to substantiate the allegations of corruption and that it is not the credibility or the political affiliation of the person who makes the allegations but the existence of materials necessitating the investigation that is the relevant factor. The decision to withdraw was not taken for reasons of State, broader public interest like maintenance of law and order, maintenance of public peace and harmony and avoidance of destabilization of stable Government etc. The reasons mentioned in the order that the State Government did not incur any loss or that the private party did not make any unlawful gain are not sustainable. The Comptroller and Auditor General of India in the final report during the period upto 31-3-1993 noted serious irregularities and loss to the State Exchequer in the import of palmolein. The Public undertaking committee of the Kerala assembly in its report dated 19-3-1996 noted serious irregularities leading to pecuniary loss to the Government in the matter. Further, the Government at the time of granting sanction under Section 197 Cr.P.C. with respect to A1 & A2 and subsequently with respect to the prosecution of the

IAS officials had considered the entire matters again and granted sanction. The sudden volte face to withdraw prosecution thereafter was purely a politically motivated decision. Shri Oommen Chandy when he was the Convener of U.D.F. committee on 3-7-2003 has made a press statement that the palmolein case will be withdrawn and the same was reported in all newspapers, a copy of which is also produced .

13. The State has also filed an affidavit pointing out that after the judgment of the Supreme Court in CrI.A.86/1998 the question whether a triable case is made out or not is a matter to be determined at the time of framing charge and the respondent would be entitled to apply for discharge at the trial court. The details mentioned in the final report would clearly show that there is a prima facie case for warranting the trial. It is pointed out that in order to clinch the deal the Director, M/s. P & E Pvt.Ltd., had met Shri Karunakaran at New Delhi and A1 after deliberating with his officials and colleagues wrote a letter to the Prime Minister vide letter dated 5-10-1991 seeking an exaggerated quantity of 30000 MT of palmolein in addition to the

usual quota for the purpose of festivals of Deepawali and Dassara while in fact the above festivals are not widely celebrated in Kerala. It is further pointed out that the reasons mentioned was only a pretext and the import sought was far in excess. The total requirement of palmolein will be only 5000 MTs. per month and the actual requirement would be 60,000 MTs. in an year. It is further pointed out that the specific clause in the Government of India Circular to the State Government for importing palmolein that the price of palmolein should not exceed the procurement price of STC or average price paid by the STC in the preceding 30 days was clearly violated. The cost of palmolein mentioned in the M/s. P & E.Pvt.Ltd., proposal was 384 USD per MT vide its letter dated 9-11-1991. On 18-11-1991 the Government requested the Central Government to give sanction for immediate release of 15000 MT of palmolein for the festivals of Christmas and Sankranthi. It is pointed out that Sankranthi is not an important festival so far as the Kerala is concerned. The quantity of 15000 MT was not required and the same helped M/s. P & E Pvt.Ltd. to dispose of 15000 MT of palmolein and to gain pecuniary

advantage. Further, on 26-11-1991 another concern, viz. M/s. Nalin and Sons DHD dealing with palmolein based at Singapore had sent a fax message to the Chief Secretary of Kerala quoting a lower rate than M/s. P & E.Pvt.Ltd., but on 27-11-1991 the offer of M/s. P & E Pvt.Ltd. was placed before the Council of Ministers as an item "outside agenda" and got it passed. It is pointed out that the Government should have reconsidered the cabinet decision in the wake of the lower tender offered by M/s. Nalin and Sons DHD. The very fact that the matter was placed before the Cabinet as an outside agenda item which is meant only for emergent matters like National calamities indicated attempt to fix deal with M/s. P & E Pvt.Ltd. As the deal involved crores of rupees, the matter should have been properly placed in the cabinet and circulated before hand. It is also pointed out that the Government of India had permitted to pay service charge upto 15% but the State has taken the decision to fix maximum limit (upto 15%) of service charges. There was no negotiations in this regard. It is further pointed out that the absence of consultation with the finance department in spite of

crores of rupees is involved is a violation of Rule 10 of the Business Rules. Further, the price ought to have been fixed on the date of agreement, i.e. 29-11-1991, as it was a time when the price of palmolein was shooting up in the International Market. The price fixed after about 2 months, i.e. on 24-1-1992 was only to help M/s. P & E Pvt.Ltd. The price had gone up from 385 USD to 405 USD per M.T. It is pointed out that the pricing and shipment were at buyers option but the option was not exercised. The reason mentioned is that M/s. P & E Pvt.Ltd. did not open the ESCROW account by then. It is noted in the file by the Managing Director, K.S.C.S.C. that "because of the delay for no fault of ours - we have to pay a higher rate of price". Further the price of palmolein was fixed at the indicative price in Malaysia market rather than the procurement price of STC which is a favour done to M/s. P & E Pvt.Ltd. by the Managing Director of K.S.C.S.C. The investigation revealed that due to price escalation and exchange rate variation a loss of 2.8 crores (sic.2.32 crores) was caused to the State. It is also pointed out that the price was fixed at USD as against Indian rupee which

resulted in huge loss to the Government by way of exchange rate fluctuation. As per agreement it is for the seller to arrange to open an ESCROW account in a commercial Bank, and hence M/s. P & E Pvt.Ltd., ought to have taken the initiative but the company deliberately postponed the same. It is further pointed out that the K.S.C.S.C was importing palmolein for the first time in 1991 but the S.T.C. was importing palmolein for Government of India and the State Governments for a long time and only after inviting global tenders and hence the same procedure ought to have been followed by the K.S.C.S.C. The contention that the price fixation could be done only after opening of the ESCROW account is also not correct. In fact on 8-1-1992, the Reserve Bank had permitted the opening of the ESCROW account and hence M/s. P & E Pvt.Ltd. ought to have opened the account on 8-1-1992; and even on that date the price fixation could have been done but the same was postponed upto 24-1-1992. The ESCROW account was opened only on 30-1-1992. Hence the opening of ESCROW account was not indispensable for fixation of the price. The Managing Director of

K.S.C.S.C did not ascertain from S.T.C. the procurement price of palmolein or the average price paid by STC preceding 30 days. On the other hand the Managing Director of K.S.C.S.C sought for indicative price from S.T.C. The S.T.C. replied that it does not have indicative price. The K.S.C.S.C had applied for import licence on 29-11-1991 quoting 390 USD per MT and the same was allowed. The customs clearance permit was forwarded to the Managing Director of K.S.C.S.C on 5-12-1992. Price fixation at an early stage was necessary for import licence and customs clearance. But the K.S.C.S.C did not fix the price then which ought to have done. If the other States have violated the directions of the Government of India, A1 and the other accused are not entitled to claim that they can also violate the guidelines in this regard. It can also be seen that the file for import of palmolein was started at the higher level, that of the Managing Director, K.S.C.S.C and the Secretary, Food & Civil Supplies etc. and the same is a violation of the Secretariat instructions and Manual of Office Procedure that the file processing must be started from the lower level. The contention that Managing

Director, K.S.C.S.C could not get the price of palmolein from S.T.C. cannot be believed. Further the decision of the Council of Ministers should be prepared in the draft Government order form and circulated to Finance Department for scrutiny and approval and the final orders can be approved only with the approval of Finance Department. The above procedure was by-passed. It was the above aspects that permitted the Comptroller and the Auditor General and the Public Undertaking Committee of the Kerala Assembly to raise the issue. It is also pointed out that even though the U.D.F.Ministry came to power in 2001, no decision to withdraw the case was taken from 2001 - 2004. It was after Shri. Oommen Chandy took over charge as Chief Minister, steps to withdraw the proceedings were taken suo motu. He had earlier issued the press statement on 3-7-2003 that the palmolein case would be withdrawn. When the Cabinet took the decision to import palmolein, the Government of India's approval was not obtained. The note of the Additional Chief Secretary reads:

“ It is understood that the formal approval of the Government of India may be issued in a day or two.”

Even the price of palmolein was not mentioned in the cabinet note. It is only mentioned that “we do not know much about them” i.e., M/s. P & E Pvt.Ltd. Such a vague proposal for costing 27 crores was hastily approved by the cabinet. It is also pointed out that the agreement was signed on 29-11-1991 before the Government order for import of palmolein was issued on 2-12-1991. It is also pointed out that none of the other accused except A1 have so far challenged the criminal proceedings.

14. I find that G.O.(Rt)No.105/05/Vig.dated 28-3-2005 that ordered for withdrawal of prosecution contains explanations as to why the price was fixed on 24-1-1992, i.e. 56 days from the date of Memorandum of Understanding and the date of agreement, i.e. 29-11-1991. It is explained that the delay in fixing the price was on account of the procedural formalities to be complied with in opening the ESCROW account, getting the customs clearance permit and also as the rupee resources for import of palmolein were not available with the Corporation and

to obtain the sight letter of credit. It is also mentioned that the Managing Director of K.S.C.S.C did make efforts to get price data from the STC right from December 1991, however, without success. It is explained that the price was fixed with cross reference to the prices fixed by other States in the market around the time and the price trends available from S.T.C. records and the references available from the Indian High Commissioner, Malaysia. The G.O. further explains that it is mentioned in the Factual Report as the loss of the K.S.C.S.C and benefit to the seller that had the price been fixed at 387.5 MT on 29-11-1991 instead of 405 MT as in January 1992, the excess of 20 USD/Metric tonne could have been avoided. It is further mentioned in the Government Order that the price clause in the Government of India Circular was not specific as there was no indication of FOB/CIF prices. Again it is mentioned that the efforts of the Managing Director to get the price data from S.T.C. did not yield any results. It is stated that the in house Committee of the K.S.C.S.C perused the price statistics available around that time and price was fixed within a week of

establishment of ESCROW account in January 1992. Besides the same pattern of price fixing by the States of Tamil Nadu, West Bengal and Karnataka was followed. Hence, there was no dishonesty involved. The affidavit filed by the State in pursuance of the above Government order, in the Supreme Court dated 24-11-2005 also contained the above details as incorporated in the G.O. dated 28-3-2005.

15. The concerned files from the departments were produced by the Government as directed by this Court. It is seen from therein that the matter was considered for quite sometime among the various departments involved and that there was a somewhat detailed cabinet note on the above aspects of the case before the withdrawal G.O. was issued. It is pointed out that the Government order and the affidavits filed do not explain the reasons for the omission to call for tenders and the act of ignoring the competitive offer presented by M/s. Nalin and Sons DHD. There is an explanation in the note file that at the time Stores Purchase Rules were not extended to K.S.C.S.C and the same was extended to P.S. Us only with effect from 1995 vide

G.O.(P)No. 2/95/SPD dated 4-2-2005. It is also pointed out that the financial propriety and the Rules of Business required consultation with the finance department. The explanation in the cabinet note and the note file is that the omission is at best a procedural irregularity. The most serious infraction as per the charge is the violation of the price clause contained in the circular of the Union Government. The explanation is that the Managing Director, K.S.C.S.C could not obtain the statistics from the S.T.C. despite efforts made.

16. The contention of the State and the point raised in the report of the C.A.G. is that the K.S.C.S.C should have fixed the price in Indian rupee on firm basis on the date of agreement. It is further pointed out that the State has incurred loss on account of escalation of conversion rate, while 15% service charges was specifically made to compensate for possible currency fluctuation. Hence price should have been fixed as per Indian rupee at a firm basis. As the prosecution has not levelled any specific charge of the above ground, I find that the above contention has no direct relevance.

17. The final report relies on the statement of CW18, the General Manager of STC that the average procurement price for palmolein for the February 1992 shipment is 392.25 USD equivalent to Rs.10139.66. The average is calculated from the C.I.F. price at Kandla Port i.e. 393.50 USD and C.I.F. price at Calcutta, i.e. 391 USD. CW20 the Government Secretary who succeeded the fifth accused as the M.D.of K.S.C.S.C. has stated, as per the final report, that the average procurement price of S.T.C. as per the Central Government guideline was a sum between 392 and 393 USD. The Factual Report mentions that if purchased at 392.25 USD per M.T., the difference would be 2.32 crores less than the purchase at 405 USD, i.e. 12.75 USD per M.T. than the average price paid by S.T.C. As per the Factual Report towards the value of palmolein, the K.S.C.S.C. paid a sum of Rs.17,12,48,718.72 and the service charges of Rs. 2,60,10,713.48. Had it been purchased at the rate of 392.25 USD, the price to be paid would have been Rs.15,13,04,010 and 15% service charges would be Rs.2,26,99,601.50. Hence, the excess payment for palmolein and service charges are

Rs.19,94,47,098.72 and Rs.33,15,111.98 respectively; and the total excess payment is Rs.2,32,59,820.70. Of course, it is noted in the Factual Report that by sale of palmolein through PDS(Public Distribution System), the K.S.C.S.C has obtained a profit of 7.7 crores. It is noted in the Factual Report that the profit would have been 10 crores had the purchase price was paid at 392.25 USD which represented the amount envisaged as per the price clause in the Government of India Circular.

18. The G.O. rescinding the earlier decision to withdraw the case, i.e. G.O.(Rt)143/06/Vig.dated 25-7-2006 is a very concise one which just mentions that the Government have examined all the matters in detail and that it is ordered to cancel the earlier G.O. and to proceed and revive the prosecution against all those accused in C.CNo.6/2003. Close on heels, on 27-7-2006 the State has filled a detailed affidavit before the Supreme Court explaining the reasons for disassociating with the affidavit filed earlier in support of the proposed withdrawal. It is seen from the Note file that the matter was just placed before the Cabinet with a very brief cabinet note and the same was not

preceded by any interdepartmental consultation. But I find that the fact remains that the matter was placed in the Council of Ministers and the decision was taken. Being an executive decision non mentioning of reasons in detail would not render it invalid. It has also to be noted that the decision has got the support of a full scale vigilance investigation in the matter. It is also to be noted that the decision to withdraw was not taken after a further investigation by the investigating agency. The G.O. seeking to withdraw the prosecution, although issued on 28-3-2005, till 24-11-2005 when the affidavit was filed before the Supreme Court, nothing was done to implement the same. The Supreme Court order permitting move to the court below under Section 321 Cr.P.C. is dated 20-4-2006.

19. Counsel for A1 has further contented that the rescinding of the G.O. directing the withdrawal of the prosecution is impermissible as according to him, the successor Government is bound to implement the orders of the previous Government and that there cannot be an arbitrary reversal of the earlier stand just because another Government came into power. It

was also contended that once a decision has been taken by the Government to withdraw the prosecution proceedings the matter is out of the control of the Government and then it is for the Public Prosecutor and the court that are empowered to examine the request for withdrawal and disposal of the same.

20. Counsel has relied on the decision reported in **Tandon Brothers v. State of W.B., (201)5 SCC 664** which was with respect to the subsequent order of the Government after a number of years superceding a notice regarding acquisition of portions of an estate in exercise of power under the West Bengal Estate Acquisition Act. But I find that the case concerned only with respect to the alleged injustice done with respect to an individual acquisition of land i.e., supercession of a notice issued after a lapse of 9 years. The situation has no resemblance at all with the fact situation in the instant case. Further the dictum therein only reiterates that Governmental action must be based on utmost good faith, belief and ought to be supported with reason. The counsel has also relied on the decision reported in **State of Haryana v. State of Punjab, (2002)2 SCC 507**

wherein the Court observed that the Constitution conceives of a Government to be manned by the representative of the people, who get themselves elected in an election, and that the decisions taken at the Governmental level should not be so easily nullified by a change of Government and by some other political party assuming power, particularly when such a decision affects some other State and the interest of the Nation as a whole. It cannot be disputed that so far as the policy is concerned, a political party assuming power is entitled to engraft the political philosophy behind the party, since that must be held to be the will of the people. But in the matter of governance of a State or in the matter of execution of a decision taken by a previous Government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding Government must be held duty bound to continue and carry on the unfinished job rather than putting a stop to the same, the Supreme court held. The matter covered by the above decision was with respect to the inter-state river dispute between the State of Haryana and the State of Punjab. The matter that had been

settled with the intervention of the Central Government and a decision was taken by both the Governments was sought to be set aside by the successor Government. The fact situation in the above case also, I find, is absolutely dissimilar with the facts in the instant case.

21. On the other hand, the counsel for the State has stressed the fact that there could be no proper governance in case the wrong decisions of the previous Government could not be reviewed and set right by the successor Government. The decisions relied on are **K.B. Sahay v. Commission, 1968 B.L.J.R. 207** of the Patna High Court, **K.B.Sahay & Others v. Commission of Enquiry & Others, 1969(1) SCR 387, State of Haryana v. Bhajan Lal, A.I.R. 1992 S.C.604.** The above cases related to the successor Government appointing the Commission of Inquiry with respect to the alleged misdeeds of the Ministers of the previous Government. The courts have consistently upheld the right of the successor Government to initiate inquiry or investigation with respect to the corrupt practices etc. by the Executives of the previous administration

and it was asserted that the just allegation of mala fides on the basis that the successor Government is formed by the political rivals of the previous Government is no reason as such to set aside the proceedings initiated. It was noted that in a democratic dispensation, the successor Government formed after the defeat of the previous Government in elections will invariably consist of political rivals or enemies of the previous Government and if that alone is considered sufficient for holding that the exercise of power by the new Government under the Act (The Commissions of Inquiry Act, 1952), is mala fide, the provisions of the Act can never be applied for inquiring into the conduct of previous Ministers and that the section will become a dead letter for that purpose. It was also pointed out that if the succeeding Ministry consists of persons who are political or personal friends of the previous Ministers, they cannot possibly be expected to appoint a Commission of Inquiry to inquire into their conduct. It was pointed out that such an argument would give complete immunities to all Ministers from any probe into their activities, however objectionable they may be, by succeeding Governments.

It was pointed out that the allegations of mala fides must be based not solely on the ground that the members of the new Government are bitter political rivals and enemies of their predecessors-in-office. Otherwise, each Ministry will become a law unto itself and the corrupt conduct of its Ministers will remain beyond scrutiny. It hardly needs any authority to state that the inquiry will be ordered not by the Minister against himself but by someone else. I find that the contention of the counsel for A1 that the successor Government is not empowered to rescind the decisions of the previous Government has no merits.

22. The other contentions raised at the instance of the first accused is that the amplitude of Section 321 Cr.P.C. relating to withdrawal as settled by the judicial decisions would show that it is for the Public prosecutor and the Court to take a decision in the matter and the Government can at best only initiate the proceedings. In the instant case, the Government has taken a decision in the matter and communicated to the office of the Director General of Prosecutions and hence it is beyond the

powers of the Government to rescind the above order. The counsel has relied on the decisions in **Sate of Orissa v. Chandrika Mohapatra, AIR 1977 S.C.903, Rajendra Kumar v. State, A.I.R. 1980 S.C.1510, Madan Gopal v. Sate of Kerala,1989(1)K.L.T.92, Sate v. L.Ganesan,1995 Crl.L.J.3849, Subhash Chander v. State, 1980(2)S.C.C.155, Amar Narain Mathur v. The State of Rajasthan, A.I.R. 1952 Raj.4.2.** I find that the above quoted decisions settle the guidelines with respect to the withdrawal of prosecution. The above decisions emphasize the legal position that it is for the Public Prosecutor to take a decision as to whether the case is of such a nature that the withdrawal is required in public interest and that independent application of mind of the Public Prosecutor that the move is required to advance public justice is the situation envisaged by the statute. The initiation is that of the Public Prosecutor and then the Court has to satisfy itself that the executive function of the Public Prosecutor has been properly exercised and that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.

It is the duty of the Public Prosecutor and the Court to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of Section 321. It was pointed out in **Rajendra Kumar v. State (op.cit)** that the bureaucrats should be careful not to use peremptory language when addressing the Public Prosecutor since it may give rise to an impression that he is coercing the Public prosecutor to move in the matter. I find that in the instant case there has been no application filed by the Public prosecutor before the court invoking Section 321. In the absence of filing of such an application, I find that there is no bar for the Government to retreat from the steps taken as evidently it is not the Government, that is the deciding authority in the matter of withdrawal. Might be the situation would have been different had the Public prosecutor applied before the court to withdraw the case. Hence it could have been contended that the court and the Public prosecutor are in seisin of the matter. In the instant case, the contentions raised are absolutely premature in this regard.

23. In the circumstances, I find that the contention of the respondent/A1 that the act of the successor Government rescinding the Government Order for withdrawal of prosecution is a mala fide exercise of power has no merits. It is held that G.O.(Rt)No.143/2006 Vig.dt.25-7-2006 that rescinded the withdrawal G.O.(Rt)105/05/Vig. dated 28-3-2005 is not vitiated by mala fides and is not liable to be struck down.

The records will be returned to the court of Special Judge, who shall proceed with the trial and disposal of the case on merits, untrammelled by any of the observations contained in this order.

K.R.UDAYABHANU, JUDGE

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